

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE EX REL. LINDER V. REMMEN

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA EX REL. MICHAEL J. LINDER, DIRECTOR, NEBRASKA DEPARTMENT OF  
ENVIRONMENTAL QUALITY, AND CITY OF ASHLAND, APPELLEES,  
v.  
ARLO W. REMMEN AND ASHLAND SALVAGE, INC., APPELLANTS.

Filed May 25, 2010. No. A-09-882.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge.  
Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and Kevin L. Griess for appellees.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Arlo W. Remmen, an individual, and Ashland Salvage, Inc., a Nebraska corporation (collectively Appellants), appeal an order of the district court for Saunders County, Nebraska, imposing civil penalties against them for a violation of the Integrated Solid Waste Management Act by improper disposal of tires on their property. On appeal, Appellants challenge the civil penalties imposed and the court's finding that the corporate entity should be disregarded and the penalties imposed against Remmen as an individual. We find no merit to the assignments of error, and we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

II. BACKGROUND

This is the second time this case has appeared on the docket of the Nebraska Court of Appeals. See *State ex rel. Linder v. Remmen*, No. A-07-887, 2008 WL 2836030 (Neb. App. July

22, 2008) (not designated for permanent publication). The case concerns property owned by Ashland Salvage, a Nebraska corporation of which Remmen is the sole owner, the president, the treasurer, and responsible for all day-to-day operations.

In December 2003, following a citizen complaint, Nebraska's Department of Environmental Quality (DEQ) inspected land owned by Ashland Salvage and operated as a junkyard. The DEQ found large amounts of solid waste, construction and demolition waste, lead batteries, containers of oil and unknown liquids, mobile homes, semi-trailers, old school buses, a railcar, and computer monitors. Included among the solid waste located on the property were more than 12,000 passenger vehicle tires, 2,000 semi tires, and 52 tractor tires.

The DEQ sent Remmen a notice of violation detailing various violations and remedial measures required to correct the violations. The DEQ informed Remmen of locations where he could properly dispose of the tires. Despite extensions of time for compliance, Remmen failed to correct the violations.

The DEQ subsequently inspected the property in 2004, 2005, 2006, and 2007. Inspection reports and photographs from these various inspections display the presence of tires on the property.

In July 2005, suit was brought against Remmen for violations of environmental protection laws concerning the various violations on the Ashland Salvage property. Injunctive relief and civil penalties were sought. On December 4, 2006, the district court granted partial summary judgment against Remmen, finding four violations of the Integrated Solid Waste Management Act and the Environmental Protection Act.

Beginning in January 2007, the City of Ashland began clearing the property of all waste materials. The DEQ inspected and photographed the property on a number of occasions throughout January and February 2007. Although waste was removed from the property, the removal was accomplished entirely by contractors for the City of Ashland. The City of Ashland incurred costs in excess of \$15,000 related to removal of the tires from the property and significant costs related to removal of other waste products.

Trial was held on the civil penalty phase of the trial, and in July 2007, the district court found that Ashland Salvage was a mere facade for Remmen's personal dealings and that the corporate entity should be disregarded. The court imposed a civil penalty against Remmen in excess of \$106,000. Remmen and Ashland Salvage appealed to this court. See *State ex rel. Linder v. Remmen*, *supra*. This court affirmed the grant of summary judgment concerning improper disposal of waste tires, but reversed the grant of summary judgment concerning the other alleged violations on the property. *Id.* We remanded for further proceedings concerning the other alleged violations. *Id.* In addition, because the judgment was being reversed in part and the matter remanded for further proceedings, we vacated the civil penalty award. *Id.*

On remand, the State dismissed the issues that were reversed by this court and sought an imposition of civil penalties concerning improper disposal of tires. The district court again found that Ashland Salvage was a mere facade for Remmen's personal dealings and that the corporate entity should be disregarded. The court imposed a civil penalty against Remmen in the amount of \$50 per day. The court found that the violation concerning improper disposal of tires had been a continuing violation that continued for 1,132 days and imposed a total civil penalty award of \$56,600. This appeal followed.

### III. ASSIGNMENTS OF ERROR

On appeal, Appellants have assigned two errors. First, Appellants assert that it was error to order civil penalties. Second, Appellants assert that it was error to determine that the corporate entity of Ashland Salvage should be disregarded.

### IV. ANALYSIS

#### 1. IMPOSITION OF CIVIL PENALTIES

Appellants first assert that it was error to order civil penalties. Appellants assert that the property was largely unchanged for more than 30 years, that the violations concerning tires were harmless and did not result in significant damage to the environment, and that the property was a small operation. We find no merit to these assertions.

Neb. Rev. Stat. § 81-1508 (Reissue 2008) provides that any person who violates a provision of the Environmental Protection Act or the Integrated Solid Waste Management Act is subject to injunctive relief, criminal penalties, and civil penalties. Neb. Rev. Stat. § 81-1508.02 (Reissue 2008) governs the imposition of civil penalties. Section 81-1508.02(2) provides that each violation shall subject a person to a civil penalty of no more than \$10,000 per day and specifies that in the case of a continuing violation, each day shall constitute a separate offense. Section 81-1508.02(2) further indicates that in assessing the amount of the fine, the court shall consider the degree and extent of the violation, the size of the operation, and any economic benefit derived from noncompliance.

This court previously affirmed the district court's grant of summary judgment concerning Appellants' violation by improper disposal of tires. There is no issue on this appeal concerning whether there was a violation for which Appellants are subject to a potential civil penalty.

The evidence indicates that the DEQ initially inspected the property in December 2003 and found, as set forth above, over 14,000 waste tires on the property. The violation continued until the City of Ashland began cleaning the property on its own in January 2007, more than 1,100 days later. Section 81-1508.02(2) specifies that the civil penalty can be as much as \$10,000 per day; for a continuing violation of more than 1,100 days, that would total over \$11 million. Instead, the court imposed a penalty of \$50 per day, substantially near the lower end of the spectrum of permissible civil penalties.

When considering the factors enumerated in § 81-1508.02(2) to be considered in determining the amount of any civil penalty to be imposed, we conclude that the court did not abuse its discretion in imposing a penalty of \$50 per day. There was evidence adduced to demonstrate that the degree and extent of the violation was significant, that the amount of the fine was appropriate for a smaller operation like Ashland Salvage, and that the economic benefit of avoiding the costs and effort of cleanup for a period of years after being advised of the violations and the need for remediation supported the award.

First, the evidence indicates that the violation in this case concerned over 14,000 tires and lasted for several years, despite specific notice of the violation, extensions of time for compliance with cleanup requirements, and information provided to Appellants concerning where and how to properly dispose of the waste tires. There was testimony indicating that large numbers of tires pose risks of fire hazards, air pollution, ground water pollution, and surface

water pollution. The tires also allowed water to accumulate and stagnate, providing a breeding ground for mosquitoes and a hazard from mosquito-borne illnesses. As such, the tires posed a public health hazard over a period of years.

Second, although the State concedes that Ashland Salvage is best characterized as a small- to medium-sized operation and that a reduction in the potential penalty was appropriate given the size of the operation, the actual award reflects such a recognition by the district court. As noted, § 81-1508.02 authorizes a civil penalty of up to \$10,000 per day for a case such as this. Given the size of the violation and the period of time over which the violation persisted without efforts by Appellants to remedy the violation, a penalty of \$50 per day reflects a substantial reduction indicative of the size of Appellants' operation.

Finally, Appellants did enjoy a financial benefit from continuing not to comply with directions to remove the tires from the property. The State adduced evidence indicating that it cost the City of Ashland more than \$15,000 for removal of the tires, and Appellants avoided incurring that cost for a period of several years by failing to act to remedy the violation.

The evidence adduced, in totality, reveals no abuse of discretion by the district court in imposing a civil penalty or in the amount of the civil penalty imposed. This was a substantial violation, that continued for a period of years, and for which Appellants failed to take action despite specific notice and offers of assistance. We find no merit to Appellants' assertion that the civil penalty was an error.

## 2. DISREGARDING CORPORATE ENTITY

Second, Appellants challenge the district court's finding that the corporate entity should be disregarded and the civil penalty imposed directly against Remmen. Appellants' argument on appeal concerning this issue is that there was no evidence adduced to demonstrate that Appellants committed a fraud against the State to warrant disregarding the corporate entity, regardless of whether the corporate entity was actually a facade for Remmen's personal dealings. We find no merit to this assertion.

In *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002), the Nebraska Supreme Court recognized that the corporate entity may be disregarded and held to be the mere alter ego of a shareholder in circumstances where necessary to prevent fraud or injustice. The Supreme Court held that when a corporation is or becomes a mere alter ego or business conduit of a person, it may be disregarded. The Supreme Court further held that among the relevant factors for determining whether to declare a corporate entity a mere alter ego and disregard it include the diversion of corporate funds or assets for personal use and whether personal business dealings of the shareholder and operations of the corporation are carried on in disregard of the corporate entity.

In this case, the evidence indicates that Remmen owned 100 percent of the interest in Ashland Salvage. Remmen is the president of Ashland Salvage, is the treasurer of Ashland Salvage, and is solely responsible for the day-to-day operations of Ashland Salvage. Further, when it comes to financial matters, Remmen does not keep personal funds separate from corporate funds. When materials from Ashland Salvage were sold to be recycled, checks were made out to Remmen personally, rather than to Ashland Salvage, and Remmen cashed the checks and put the money "in [his] behind pocket." We find no error by the district court in

disregarding the corporate entity in this situation and imposing the civil penalty against Remmen personally.

#### V. CONCLUSION

We find no merit to the assertions of Appellants on appeal. We affirm.

AFFIRMED.